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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No.

PHILIP JOSEPH MAITA, *Petitioner,*

VS.

EARL WHITMORE, *Sheriff, Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

The petitioner, Philip Joseph Maita, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on December 9, 1974.

OPINIONS BELOW

Ninth Circuit: The Opinion of the United States Court of Appeals for the Ninth Circuit (Maita v.

Whitmore, No. 74-1498) in this case has not yet been reported, and is set forth in Appendix A.

District Court: The Memorandum and Order of the United States District Court for the Northern District of California is reported at 365 F. Supp. 1331, and is set forth in Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on December 9, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTION PRESENTED

Is a criminal defendant, charged with four counts of contempt, each of which carries a statutory penalty of six months in jail, in a state which permits the trial judge to impose consecutive sentences, entitled to a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First, Sixth and Fourteenth Amendments to the Constitution of the United States, as follows:

> First Amendment: "Congress shall make no law . . . abridging the freedom of speech . . ."

Sixth Amendent: "In all criminal prosections, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Fourteenth Amendment: "Nor shall any state deprive any person of life, liberty or property without due process of law . . ."

California Penal Code Section 11225 et seq., as follows:

§11225. Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation or prostitution, are held or occur, is a nuisance which shall be enjoined, abated and prevented, whether it is a public or private nuisance.

§11226. Whenever there is reason to believe that a nuisance as defined in this article is kept, maintained or is in existence in any county, the district attorney, in the name of the people of the State of California, must, or any citizen of the State resident within said county, in his own name may, maintain an action in equity to abate and prevent the nuisance and to perpetually enjoin the person conducting or maintaining it, and the owner, lessee or agent of the building, or place, in or upon which the nuisance exists, from directly or indirectly maintaining or permitting it.

§11227. Whenever the existence of a nuisance is shown in an action brought under this article to the satisfaction of the court or judge thereof,

either by verified complaint or affidavit, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance.

§11229. Any violation or disobedience of an injunction or order expressly provided for by this article is punishable as a contempt of court by a fine of not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000), by imprisonment in the county jail for not less than one nor more than six months, or by both.

California Penal Code Section 669, as follows:

"When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently, or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be. . . ."

STATEMENT OF FACTS

Between 1964 and 1972, petitioner Philip Joseph Maita owned a bar in San Mateo, California. In addition to alcoholic beverages, the "Easy Street," as

the premises were called, offered entertainment to its patrons.

On December 11, 1969, the District Attorney of San Mateo County filed a civil complaint against petitioner and the owner of the building in which the Easy Street was located. The complaint alleged, pursuant to Section 11225 of the California Penal Code, that the entertainment presented on the premises constituted a public nuisance. The complaint prayed for injunctive relief to abate the nuisance.

Pursuant to California Penal Code Section 11227, the San Mateo County Superior Court on January 27th (1970), issued its temporary injunction enjoining petitioner from presenting certain types of films and other entertainment to adult patrons on his premises. Petitioner sought relief from this injunction through the California courts without success.

On September 14, 1971, the temporary injunction was modified pursuant to stipulation between petitioner and the San Mateo County District Attorney. The injunction as modified continued to enjoin certain types of films and other entertainment.

On February 2, 1972, petitioner was served with an order to show cause charging him with four counts of contempt of court for violating the preliminary injunction of January 27, 1970, as modified September 14, 1971. The order to show cause charged that on each of four dates in January of 1972, petitioner exhibited sexually explicit films and permitted nude cocktail waitresses on his premises, all in violation of the injunction.

Each of the four counts of contempt of court with which petitioner was charged carried a maximum penalty of six months in the county jail and/or a $1,000.00 fine. Under California law, the trial judge had the power to impose consecutive sentences.

Petitioner appeared in San Mateo County Superior Court on February 17, 1972. He requested a trial by jury; this request was denied.

Thereafter the Superior Court took testimony from the People and from petitioner.

On March 3, 1972, the Superior Court held petitioner in contempt of court on each of the four counts charged. Petitioner was sentenced to six month in the county jail on Count One, with four of the six months suspended. He was sentenced to sixty days in the county jail on each of the other three counts, with these sentences to be served concurrent to the sentence imposed on Count One. Petitioner was also ordered to pay a fine of $1,000.00 on Count One and $500.00 on each of Counts Two, Three and Four, for a total of $2,500.00.

Since a judgment of contempt is not appealable under California law, petitioner sought relief on habeas corpus and certiorari from the Court of Appeal. This was denied on May 19, 1972. The California Supreme Court denied a hearing on June 15, 1972.

On June 6, 1972, petitioner filed a petition for writ of habeas corpus in the United States District Court

for the Northern District of California. At substantially the same time, the Honorable William O. Douglas, Associate Justice of the United States Supreme Court, issued an order staying the judgment of the San Mateo County Superior Court pending the filing and adjudication of a petition for writ of certiorari in the United States Supreme Court.

Petitioner filed a petition for writ of certiorari to the United States Supreme Court on September 1, 1972. The petition was denied on February 20, 1973 (Mr. Justice Douglas would have granted certiorari). (No. 72-407).

Thereafter the habeas corpus petition was resubmitted to the District Court. On November 12, 1973, after a hearing, the District Court issued a memorandum and order concluding, *inter alia,* that petitioner had been deprived of his Sixth Amendment right to trial by jury in the State Court. The District Court therefore vacated the judgment and sentence of the Superior Court.

Notice of appeal was timely filed and the District Court stayed imposition of its order pending determination of the appeal.

On December 9, 1974, the Court of Appeals for the Ninth Circuit reversed the order of the District Court, holding that petitioner's right to a jury trial had not been abridged. The Court of Appeals stayed the issuance of its mandate pending the filing of a petition for writ of certiorari in the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals conflicts with the decisions of this Court on the Sixth Amendment right to trial by jury.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee the right to a jury trial in all criminal cases except when the offense charged is a "petty" offense. *Duncan v. Louisiana,* 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444.

In determining whether a State offense is "petty", the decisive factor is the maximum penalty authorized by the legislature. Where a State defendant faces a *potential* sentence of more than six months in jail, he is entitled to a jury trial, *regardless of the penalty actually imposed. Baldwin v. New York,* 399 U.S. 66, 69, 26 L.Ed.2d 437, 90 S.Ct. 1886 (1970). In *Duncan v. Louisiana,* 391 U.S. 145, 159-160, 20 L.Ed.2d 491, 502, 88 S.Ct. 1444, for example, the statutory maximum penalty was two years in jail. This Court held that a jury trial was required, despite the fact that the sentence actually imposed was sixty days in jail and a $50.00 fine.

In the present case the California Legislature expressly authorized a maximum penalty for petitioner, upon conviction, of two years in jail and a $4,000.00 fine. He was charged with four separate violations of California Penal Code Section 11229, each of which provided for six months in jail and a $1,000.00 fine. Under California law it is discretionary with the court as to whether the sentences on multiple counts shall run consecutively or concurrently. Penal Code

Section 669; *People v. Morales* (1967) 252 Cal.App.2d 537, 60 Cal.Rptr. 671; *In re Sandel* (1966) 64 Cal.2d 412, 50 Cal.Rptr. 462; *People v. Loeber* (1958) 158 Cal.App.2d 730, 323 P.2d 136, appeal dismissed 358 U.S. 139, 14 L.Ed.2d 226, 76 S.Ct. 242.

Petitioner was in fact penalized on *each* of the four counts charged; the court imposed concurrent sentences as to the jail sentences and consecutive sentences as to the fines (the judgment of the Superior Court is set forth in Appendix C). The court gave no inkling that it would impose concurrent, as opposed to consecutive, jail sentences until judgment was pronounced.

The reliance of the Court of Appeals upon *Taylor v. Hayes,* ..... U.S. ....., 41 L.Ed.2d 897, 94 S.Ct. ..... (1974) and *Codispoti v. Pennsylvania,* ..... U.S. ....., 41 L.Ed.2d 912, 94 S.Ct. ..... was misplaced. In both of these cases, the defendants were charged and tried under contempt specifications that carried no maximum statutory penalties. *Taylor* and *Codispoti* were merely extensions of the well-established rule that if no specific maximum penalties are authorized by the legislature, the court must look to the severity of the penalty actually imposed in order to determine the seriousness of the offense for Sixth Amendment purposes. *Bloom v. Illinois,* 391 U.S. 194, 20 L.Ed.2d 522, 88 S.Ct. 1477; *Cheff v. Schackenberg,* 384 U.S. 374, 16 L.Ed.2d 629, 86 S.Ct. 1523 (1966).

The California Legislature enacted a statutory scheme which provided that petitioner could be imprisoned for two years for the charged violations of

Penal Code Section 11229. This took the present case out of the reach of *Taylor v. Hayes, supra,* and *Codispoti v. Pennsylvania, supra,* and rendered the actual jail sentence irrelevant insofar as it affected his right to a jury trial.

Another crucial distinction between the present case and *Taylor v. Hayes, supra,* and *Codispoti v. Pennsylvania, supra,* is that the latter involved "direct" contempts committed on the record in the Court's presence, while here the alleged contempts were "indirect". In the dissent to *Codispoti v. Pennsylvania, supra,* concurred in by the Chief Justice, Justice Stewart and Justice Rehnquist, Justice Blackman pointed out that

> "Where, as in Bloom, the criminal contempt takes place outside the presence of the court, there is little to distinguish the contempt, for purposes of using a jury as the fact finder, from the run-of-the-mill criminal offense." (41 L.Ed.2d at 925).

Sound policy reasons underlie a differentiation between "direct" and "indirect" contempts. In the case of direct contempts, the questionable usefulness of a jury as the finder of fact, coupled with the right of the court to deal with direct challenges to its authority and dignity, may justify, consistent with the Sixth Amendment, some curtailment of the right to a jury trial. Where, however, as here, the allegedly contemptuous conduct occurs outside the court's presence, and involves factual determinations identical to those called for in any criminal case, the efficient administration of justice does not benefit from denial of trial by jury.

The District Court recognized the potential for abuse in a system which permits a prosecutor arbitrarily to divide a continuing course of conduct into numerous petty offenses, then prosecute them all under a single charging document. This subjects the accused to a lengthy period of imprisonment, yet curtails his right to a jury trial.

Nothing can alter the fact that as petitioner stood before the San Mateo County Superior Court for trial, he was facing a statutorily authorized penalty of two years in jail and a $4,000.00 fine. At that point he had a right to a jury trial. Denial of his request constituted a violation of rights secured to him by the Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that the petition for Writ of Certiorari be granted.

Dated, San Jose, California,
January 15, 1975.

DONALD A. TENENBAUM,
ALLEN RUBY,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 74-1498

Philip Joseph Maita,
Petitioner-Appellee,
vs.
Earl Whitmore,
Respondent-Appellant.

[Filed Jan. 3, 1975]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Allen Ruby, counsel for the Appellee, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellee herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before January 26, 1975.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final

disposition of the case by the Supreme Court of the United States.

/s/ Ben C. Duniway
Ben Cushing Duniway
United States Circuit Judge.

Jan. 3, 1975
Dated: San Francisco, Calif.

United States Court of Appeals
for the Ninth Circuit

No. 74-1498

Philip Joseph Maita,
Petitioner-Appellee,
vs.
Earl Whitmore,
Respondent-Appellant.

[Filed Dec. 9, 1974]

On Appeal from the United States District Court
for the Northern District of California.

Before: DUNIWAY and TRASK, Circuit Judges, and SMITH,* District Judge.

OPINION

DUNIWAY, Circuit Judge:

Sheriff Whitmore appeals from an order granting Maita's petition for a writ of habeas corpus. We reverse.

The sole question presented for decision is whether Maita was entitled, under the Fourteenth and Sixth Amendments, to a jury trial when he was charged in California Superior Court with four separate crim-

*The Honorable Russell E. Smith, Chief Judge, United States District Court for the District of Montana, sitting by designation.

inal contempts. Each was punishable by a jail term fixed by statute at "not less than one nor more than six months" (Cal. Penal Code § 11229).[1] Maita could have been sentenced to four consecutive six month terms but was actually sentenced to a total of not more than six months.

The California court had issued a temporary injunction enjoining Maita from doing certain things prohibited by the California Redlight Abatement Act, Cal. Penal Code §§ 11225-35. The validity of the injunction is not here in issue. Maita was later charged with specific violations of the injunction occurring on each of four different days. He demanded a jury trial, which was denied, and he was tried by the court and found to have committed each of the contempts charged. His sentence for the first contempt was six months in jail, with four months suspended.[2] For each of the other three contempts, his sentence was 60 days in jail. All sentences, however, were concurrent, so that his total sentence was not more than six months. Maita has exhausted his state remedies as they relate to his right to a jury trial. The district court held that Maita had been deprived of his constitutional right to a jury trial. *Maita v. Whitmore,* N.D. Cal., 1973, 365 F. Supp. 1331, at 1337-40. We reverse.

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[1]Section 11229 also provides for fines, which were imposed in this case. That phase of the case, however, is not before us.

[2]Under the decision in *Frank v. United States,* 1969, 395 U.S. 147, 150, it would appear that this sentence is to be treated, as it relates to the right to a jury trial, as a two month sentence, not a six month sentence. We need not decide the question, because in any event the total sentence did not exceed six months.

The answer to our question can be found in two decisions of the Supreme Court, handed down on June 26, 1974; *Taylor v. Hayes,* ..... U.S. ....., and *Codispodi v. Pennsylvania,* ..... U.S. ..... Together, these cases stand for the following propositions.

First: The rules as to whether an ordinary criminal offense is "petty," thus not requiring a jury trial, or "serious," thus requiring a jury trial, also apply to charges of criminal contempt. *Codispodi v. Pennsylvania, supra,* ..... U. S. at ..... (slip op. at 5); *Taylor v. Hayes, supra,* ..... U.S. at ..... (slip op. at 6-7).

Second: "[C]rimes carrying more than six month sentences are serious crimes and those carrying less are petty crimes." (*Codispodi v. Pennsylvania, supra,* ..... U.S. at ..... (slip op. at 6); *Taylor v. Hayes, supra,* ..... U.S. at ..... (slip op. at 6-7).)

Third: "[J]udgment about the seriousness of the crime is normally heavily influenced by the penalty authorized by the legislature." *Codispodi v. Pennsylvania, supra,* ..... U.S. at ..... (slip op. at 5). Indeed, if the penalty authorized by the legislature exceeds six months, there is a right to a jury trial, even though the judge could impose a sentence of six months or less. *Baldwin v. New York,* 1970, 399 U.S. 66, 68-9, and cases there cited.

Fourth: Where the legislature has not prescribed a penalty, as is often the case when the charge is criminal contempt, the actual sentence imposed determines whether the offense is "serious" or "petty."

Codispodi v. Pennsylvania, supra, ... U.S. ..... (slip op. at 5-6); *Taylor v. Hayes, supra,* ..... U.S. at ..... (slip op. at 6-7). In such a case, when multiple contempts are tried together, the imposition of consecutive sentences aggregating more than six months makes the offenses "serious" and requires a jury trial. *Codispodi v. Pennsylvania, supra,* ..... U.S. at ..... (slip op. at 10-11). On the other hand, where there are convictions for several contempts but the aggregate sentence does not exceed six months because the sentences are concurrent, jury trial is not required. *Taylor v. Hayes, supra,* ..... U.S. at ..... (slip op. at 7). Moreover, it makes no difference that the trial judge at first imposes consecutive sentences totalling more than six months, if he afterward reduces them to six month sentences to be served concurrently; jury trial is not required. *Id.* at ..... (slip op. at 7).

We are persuaded that *Taylor v. Hayes, supra,* governs the case at bar. The legislature has fixed the maximum jail term at six months. This points strongly to a holding that the offense is "petty." Had but one contempt been charged, no jury trial would have been required. This is conceded. Maita argues that, because four offenses were charged, the maximum penalty, as established by the legislature, is 24 months, and that therefore the aggregate offense charged is "serious." He bases this argument on the judge's power to impose consecutive sentences.

We conclude that, where the judge has discretion to impose more than six months by imposing consecutive sentences, just as where he has discretion to impose

more than six months because there is no statutory maximum, it is the judge's exercise of his discretion, not the mere fact that he has discretion, that determines whether the offense is "petty." This, we think, is the teaching of *Taylor v. Hayes, supra.* In the case at bar, the judge exercised his discretion to impose not more than six months. We conclude that, in principle, *Taylor* requires reversal.

The cases on which Maita relies do not require affirmance. In *United States v. Seale,* 7 Cir., 1972, 461 F.2d 345, the legislature had not fixed a maximum penalty for the offenses charged; on its facts, *Seale* almost exactly parallels *Codispodi v. Pennsylvania, supra. Language in Baldwin v. New York, supra,* which might be interpreted to mean that the mere possibility, by virtue of the trial judge's discretion to impose consecutive sentences, of imprisonment greater than six months entitles a defendant to jury trial, must be read in light of the facts of that case. There the possibility of "serious" punishment derived from the one year maximum sentence prescribed by the legislature for the single offense charged. In the case at bar, the legislature has determined that a single offense is "petty," and the possibility of "serious" punishment derives from the trial judge's discretion to impose consecutive sentences for multiple offenses. On its facts *Baldwin* is not in conflict with our holding that multiple charges of an otherwise "petty" offense do not become the equivalent of a "serious" offense when the judge's discretion to impose consecutive sentences aggregating more than six

months is not exercised. We also reject the holding in *United States v. Potvin,* 10 Cir., 1973, 481 F.2d 381, which was based on what we consider, in the light of *Taylor v. Hayes, supra,* to be an impermissibly broad reading of *Baldwin*

The order appealed from is reversed.

Appendix B

In the United States District Court
for the Northern District of California

No. C-72-1203-OJC

Philip Joseph Maita,
Petitioner,
vs.
Earl Whitmore,
Respondent.

[Filed Nov. 12, 1974]

MEMORANDUM AND ORDER

Petitioner has filed a petition for writ of habeas corpus which challenges the constitutionality of four contempt convictions stemming from violations of a temporary injunction issued by the Superior Court of San Mateo County. Jurisdiction is based upon 28 U.S.C. § 2254 in order that the Court may consider the federal constitutional issues raised.

There is no dispute as to the essential factual issues of the case. Petitioner operated "The Easy Street," a night-club located in San Mateo, California. That establishment presented both live and cinematic entertainment and offered alcoholic beverages to its customers served by nude and partially nude waitresses.

On December 11, 1969, the District Attorney of San Mateo County, pursuant to Section 11226 of the Cali-

fornia Penal Code, filed a civil complaint alleging that certain entertainment presented on the above-mentioned premises was lewd and therefore constituted a public nuisance. The complaint requested injunctive relief to abate the alleged nuisance.

After a ten day hearing on the matter, the San Mateo County Superior Court issued a temporary injunction on January 27, 1970 which enjoined petitioner from presenting on The Easy Street premises certain types of entertainment and engaging in certain modes of conduct that the court had determined to be "lewd". Petitioner challenged the injunction in both the California Court of Appeal and the California Supreme Court without success.

On September 14, 1971, the temporary injunction was modified pursuant to a stipulation by the parties. Said stipulation listed the conduct prohibited and resulted in the hearing on the plea for abatement being taken off calendar until deemed necessary by the parties.

After a period of some four and one-half months, petitioner was ordered to show cause why he should not be held in contempt for willful violation of the temporary injunction as modified by the September 14, 1971 stipulation.

The hearing on the order to show cause was held on February 18 and March 2 and 3, 1972 and the court, despite petitioner's request for a jury trial, determined that the conduct of the petitioner violated the terms set forth in the injunction. Petitioner was convicted of four counts of contempt—one for

each of the days the proscribed conduct occurred (January 21, 22, 23, 24, 1972)—and was ordered to pay a fine of $1,000 and sentenced to six months in the county jail on one of the counts and was fined $500 and sentenced to sixty days in the county jail on each of the remaining three counts. Four months of the six month sentence were suspended and the jail sentences on all counts were ordered to run concurrently.

Petitioner again sought relief from the California Court of Appeal and the California Supreme Court and, his claim denied in those forums, petitioned the United States Supreme Court for a writ of certiorari.

His petition having been rejected by the United States Supreme Court, petitioner now seeks federal habeas corpus relief citing, as noted above, the constitutional issues involved.

Petitioner has presented to the Court two basic constitutional issues. The first, relating to the question of prior restraints under the First Amendment, goes to the substance of the conviction itself. The second issue involves the procedural aspects leading up to petitioner's conviction—his right to a jury trial when charged with four contempt citations.

PRIOR RESTRAINT ISSUE

The "Red Light Abatement Act," California Penal Code §§ 11225 *et seq.*, sets forth a civil procedure designed to abate certain activities considered to be public nuisances. Included within the statute's regulatory parameters are those buildings or places used

for the purpose of "lewdness" or where acts of "lewdness" are held or occur.

Petitioner alleges that he is attacking, not the Red Light Abatement Act itself, but the constitutionality of the injunction issued pursuant to the Act's proceedings[1] and the resultant contempt convictions.[2] The injunction, petitioner argues, constitutes a prior restraint insofar as no judicial determination of the First Amendment characteristics of the enjoined activities was made, and the injunction thereby prohibited protected as well as non-protected speech.

The prior restraint issue presented by petitioner is therefore twofold: were adequate hearings provided to petitioner, and if so, was the judicial determination that petitioner's activities were not protected by the First Amendment correct?

Adequacy of Hearing

Although the scope of the First Amendment as applied to certain types of expression is often uncertain, the Supreme Court has been quick to strike

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[1]Section 11227 of the California Penal Code provides:
"Whenever the existence of a nuisance is shown in an action brought under this article to the satisfaction of the court or judge thereof, either by verified complaint or affidavit, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance."

[2]Section 11229 of the California Penal Code provides:
"Any violation or disobedience of an injunction or order expressly provided for by this article is punishable as a contempt of court by a fine of not less than two hundred dollars ($200) nor more than one thousand dollars, by imprisonment in the county jail for not less than one nor more than six months, or by both."

down governmental attempts to limit speech before it is uttered or before it is found to be offensive. *Niemotko v. Maryland,* 340 U.S. 268, 273 (1951); *Near v. Minnesota,* 283, U.S. 697, 713 (1930). Accordingly, the necessity for a prompt adversary hearing prior to the abatement of any type of speech has become a cornerstone of First Amendment law. *Carroll v. Princess Anne,* 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 66 (1962); *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 440 (1957). The extent of judicial scrutiny of those statutory schemes intended to curtail freedom of expression was sharply delineated by the Supreme Court in the *Bantam Books, Inc.* case, *supra.* Justice Brennan, speaking for the Court, stated that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity [citations]. We have tolerated such a system only where it operated under judicial superintendence and assured an almost immediate judicial determination of the restraint." *Bantam Books, Inc. v. Sullivan, supra,* at 70.

It is the quality of the above-mentioned "judicial superintendence" that is presently under attack; petitioner alleges that no judicial officer has ever declared the activities upon which the contempt convictions were based to be obscene and that he has been afforded no opportunity to prove that the conduct for which he is being punished is, in fact, protected speech. In support of his contentions, petitioner stresses the refusal of the court to consider the obscenity issue at the contempt hearings.

Petitioner is very much in error when he alleges that no hearings were held in order to determine the obscenity of the conduct in question. Pursuant to § 11227 of the California Penal Code, petitioner was allowed to full adversary hearing on the obscenity issue.[3] The evidence clearly indicates that petitioner took full advantage of the opportunity—he presented twenty-one witnesses and numerous exhibits over a two week span that concluded on January 8, 1970. When the hearings were terminated, the trial judge issued a memorandum decision incorporating the law and the facts in support of its determination that petitioner's conduct was obscene. Petitioner challenged the temporary injunction issued as a result of the above-described hearing by seeking a writ of prohibition in the California Court of Appeal and, when his petition was denied, sought without success a hearing in the California Supreme Court.

Upon his failure to have the injunction overturned by the appellate courts, petitioner voluntarily entered into a stipulation whereby he agreed to abide by the provisions of the temporary injunction as modified and the District Attorney would remove the hearing on the plea for abatement from the calendar.[4]

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[3]At this hearing the court equated the "lewdness" term utilized in the Red Light Abatement Act with obscenity and treated the terms as synonymous.

[4]Due to this stipulation, petitioner prevented the final step of the Red Light Abatement Act from reaching fruition. This final step—a hearing to determine if the temporary injunction should be permanent—could have resulted in an order of abatement and a closing of The Easy Street premises. California Penal Code § 11230.

Respondent argues that petitioner's decision not to pursue a hearing on the plea for abatement constitutes a failure to exhaust

The hearings provided to petitioner more than adequately meet the standards delineated by *Bantam Books, Inc. v. Sullivan, supra* and *Kingsley Books, Inc. v. Brown, supra.* Petitioner received prompt notice, a specific complaint, an adversary hearing, and an opportunity to contest the outcome of the hearing in the appellate courts. That such a hearing sufficiently meets constitutional standards is made clear by the Supreme Court when it recently approved a scheme involving civil injunctions that is very similar to the Red Light Abatement Act. *Paris Adult Theatre I v. Slaton,* ..... U.S. ..... (1973).

Petitioner apparently believes that the First Amendment entitles him to litigate the obscenity issue twice —once at the time the temporary injunction is issued and once at any subsequent contempt hearing.[5] As was discussed above, petititoner's hearing prior to the issuance of the temporary injunction was sufficient to satisfy the constitutional provisions relating to freedom of expression. Once such a determination of

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state remedies. The only issue before this Court is the validity of the contempt convictions. A hearing on the plea for abatement, after petitioner has allegedy violated the terms of the temporary injunction, would have absolutely no effect on the contempt convictions. Consequently, such a hearing is not a "remedy" within the meaning of 28 U.S.C. § 2254(b) and petitioner's stipulation cannot be equated with a failure to exhaust state remedies.

It should be noted, however, that petitioner cannot now complain that he did not receive a hearing regarding the issuance of a permanent injunction. The adequacy of hearing and determination of obscenity issues discussed above relate only to the issuance of a temporary injunction.

[5]At the hearing on the contempt citation, the Superior Court, over petitioner's vigorous objection, determined that the obscenity question was irrelevant and refused to hear any evidence on the issue. This refusal appears to be the basis of petitioner's argument that he was allowed no hearing on the constitutional issue involved.

obscenity is made and an injunction properly issued the only consideration before the court in a contempt proceeding is if petitioner in fact violated the terms of the injunction. *Cf. Walker v. Birmingham,* 388 U.S. 307 (1967). Accordingly, the judge's failure to allow petitioner to litigate the obscenity issue at the contempt trial did not deny petitioner a hearing on that issue and does not constitute a prior restraint.

Determination of Obscenity

The injunction having been properly issued, the remaining question relating to the First Amendment involves the sufficiency of the issuing court's determination that petitioner's activities were obscene. Petitioner clearly cannot be punished for dissemination of speech that is constitutionally protected. *Cf. Thornhill v. Alabama,* 310 U.S. 88 (1940). As noted above, however, it is the determination of the court issuing the temporary injunction, not the court hearing the contempt proceedings, with which this Court is concerned.

The test utilized by the court issuing the injunction (hereinafter referred to as the trial court) is identical to that set forth by the United States Supreme Court in *Roth v. United States,* 354 U.S. 476 (1975). The trial court defined obscene matter "as that which taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to *prurient interest,* . . . and is matter which taken as a whole goes *substantially beyond the customary limits of candor* in description or representa-

tion of such matters; and is matter which taken as a whole *is utterly without redeeming social importance or value.*" (Emphasis in original memorandum decision).

Applying the above-mentioned standards to the activities at The Easy Street premises, the trial court determined that those activities were obscene and therefore not constitutionally protected. It is thus apparent that the trial court utilized a test that is more stringent than required by the Constitution. *Miller v. California,* ..... U.S. ..... (1973).

The Supreme Court has indicated that ". . . the states have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." *Miller v. California, supra* at 11. This wider degree of latitude in regulating nonverbal, physical conduct has been expressed in several different contexts by the Court. See, *e.g., California v. LaRue,* 409 U.S. 109 (1972); *United States v. O'Brien,* 391 U.S. 367 (1968); *Cox v. Louisiana,* 379 U.S. 536 (1965). Conduct including elements of both speech and nonspeech may be regulated only if "the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien, supra* at 377.

The state's interest in abating the type of conduct with which petitioner was involved has been judicially recognized. *Paris Adult Theatre I v. Slaton, supra* at 8-15, and petitioner makes no showing, and the

Court can perceive none, that the state's action goes beyond that necessary to promote the furtherance of said interest. Accordingly, the trial court's determination that petitioner's activities were not protected by the First Amendment is in concert with established judicial guidelines and should not be overturned.

It should be noted that petitioner also argues that he is being punished for future conduct, as yet unascertained, because of his past activities. The temporary injunction, however, carefully delineates the conduct that is to be proscribed and prohibits only the continuance of activities that the trial court has determined to be obscene. In fact, the *Miller* case *supra*, suggests some "plain examples" of what type of conduct could be regulated as obscene that are identical to those activities set forth in the temporary injunction. Therefore, it is clear that the temporary injunction does not restrict some vague, unspecified future conduct, but details explicitly those obscene acts that are not to be repeated.

RIGHT TO JURY TRIAL ISSUE

At his hearing on the contempt citations, petitioner's request that he be tried by a jury was denied. Petitioner alleges that the Sixth Amendment, as applied to the states through the Fourteenth Amendment, entitled him to have a jury trial on the contempt issue.[6]

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[6]It should be carefully noted that petitioner does not allege that he is entitled to a jury trial at any proceeding other than the contempt hearing, and the Court addresses the issue only in that context.

The constitutional perimeters of the right to jury trial have been established with some degree of certainty. The Fourteenth Amendment guarantees a jury trial in all criminal cases except when the offense involved is considered to be "petty." *Duncan v. Louisiana,* 391 U.S. 145 (1968). Additionally, a criminal contempt charge[7] is a crime in every essential respect and therefore only petty contempts may be tried without a jury. *Bloom v. Illinois,* 391 U.S. 194 (1968). Thus it is clear that petitioner would be entitled to a jury trial if the contempt citations are to be considered serious.

The guidelines established by the Supreme Court are somewhat less definitive in fleshing out the distinction between the serious and petty offense. It has been somewhat categorically stated that no offense can be deemed petty where imprisonment for more than six months is authorized. *Baldwin v. New York,* 399 U.S. 66 (1969). Six months has been selected as an objective criterion reflecting the seriousness with which society regards any particular offense, *cf. District of Columbia v. Clawans,* 300 U.S. 617, 628 (1937), and thus an appropriate measure of the constitutional necessity for a jury trial. It is the determination of this six month period that presents the key issue in the case at bar.

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[7]Petitioner was clearly facing criminal contempt charges—he was being punished for disobedience of a court order; the contempt charges were not intended to be remedial in effect. Compare *Cheff v. Schnackenberg,* 384 U.S. 373 (1966) with *Shillitani v. United States,* 384 U.S. 364 (1966).

It is clear that, if a specific penalty is authorized, that potential penalty is the factor that must be considered in determining the right to a jury trial. *Frank v. United States,* 395 U.S. 147 (1969); *Duncan v. Louisiana, supra.* Thus the penalty actually imposed by the court—six months in the county jail on the count (four months suspended) and sixty days in the county jail on the remaining counts in the instant case[8]—is not the relevant factor governing the availability of a jury trial.[9] In *Duncan v. Louisiana,* for example, the defendant received only a sixty day sentence and a $50 fine. However, since the maximum penalty authorized was two years imprisonment, the offense could not be considered petty and the defendant was entitled to a trial by jury.

The maximum penalty authorized for the offense petitioner was convicted of is six months in jail. However, petitioner argues that the maximum authorized penalty he faced at the contempt hearing was not a mere six months, but two years—six months on each of the four counts with which he was charged. Thus the question the Court must decide is whether—when charged with four counts of contempt—petitioner should be permitted to aggregate the authorized sentences in order to determine his right to a jury trial.

Although criminal contempt matters are generally to be treated as regular criminal charges, there exist

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[8]The fine imposed by the Court will be discussed *infra.*

[9]If no penalty is authorized, then the court should look to the severity of the penalty actually imposed. *Frank v. United States, supra.* Since § 11229 of the California Penal Code specifically authorizes a maximum penalty of six months, the penalty actually imposed by the court seems to be irrelevant.

considerations in the contempt situation not applicable to the more conventional criminal case. *Bloom v. Illinois, supra.* The virtually limitless authority of a court within the contempt framework was a major factor behind the extension of the right to a jury to the contempt trial. The *Bloom* court was very anxious to interpose the jury between the defendant and what the court termed "the arbitrary exercise of official power." *Bloom v. Illinois, supra* at 202.

It was this potential for judicial abuse that prompted the Seventh Circuit to adopt the aggregation rule in *United States v. Seale,* 461 F.2d 345 (7th Cir. 1972). In that case the defendant was sentenced to three months imprisonment for each of sixteen acts of misconduct that occurred during his trial. The *Seale* court, cognizant of the need for some restrictions on the trial court's summary contempt power, aggregated the sentences and, since the total exceeded six months, determined that the defendant was entitled to a jury trial. It should be noted that the aggregation rule was adopted to a very limited extent: only in summary contempt proceedings where a judge waits until the termination of the proceedings to cite for contempt would the sentences be combined. The rationale behind this rule is sound—the court could impose punishment greatly in excess of six months for one "outrageously contumacious" act by spreading out the sentence among other, less serious offenses. *United States v. Seale, supra* at 355.

Although the *Seale* case provides some insight into the relationship between contempt convictions and the

right to trial by jury, it is by no means determinative of the issue presented by the case at bar. The *Seale court* was careful to emphasize the summary nature of the contempt involved and state that it did not express an opinion in the case of an "indirect" contempt for violation of a court injunction. *United States v. Seale,* supra at 355. The Court additionally pointed out that the indirect contempt situation is not necessarily as susceptible to the same abuses as the direct contempt power. This, to a certain extent, is true. However, there exist similar difficulties in the contempt situation where the court is punishing for violation of its injunction that equal or surpass those dangers inherent in the summary contempt proceedings. Accordingly, this Court must examine the petitioner's contempt convictions against the background of those cautions articulated in *Bloom* and *Seale* and determine if there exists sufficient cause to cumulate the authorized sentences in the case at bar.

Petitioner was charged with four counts of contempt—*i.e.,* violation of the temporary injunction on each of four consecutive days (January 21, 22, 23, 24, 1972). The acts violating the injunction could best be characterized as a continuing course of conduct; there appears to be no real variation in petitioner's conduct on any of the four days in question. The decision to cite petitioner on four counts is thus somewhat arbitrary—petitioner was not cited for separate and distinct acts, but merely for each of the days the proscribed conduct happened to take place—since there appears to be no legal significance connected with the

mere passage of time. The issues presented in the case at bar are therefore analogous to those in the *Seale* case. The Court could divide petitioner's conduct into various periods and thus impose, separately, penalties it could not otherwise assess without allowing a jury trial. Thus, by compartmentalizing conduct that is essentially continuous into blocks of time, a court could mete out penalties far in excess of six months and effectively avoid the necessity of a jury trial.

Although the aggregation of sentences issue has received little attention from the courts, the "continuing course of conduct" emphasis is hardly unique. The First Circuit has recognized that a witness commits only a single offense when he continuously refuses (upon First Amendment grounds) to answer questions relating to a "single subject" or a "single line of inquiry." *Baker v. Eisenstadt,* 456 F.2d 382 (1st Cir. 1972). The court in *Baker* was "wary lest prosecutors by their sheer ingenuity in conceiving and stamina in asking multiple questions calling for slightly different answers, be able to proliferate offenses." *Baker v. Eisenstadt, supra* at 390.

The Seventh Circuit, interpreting the *Seale* decision, indicated that the aggregation rule would be applicable in a situation where the contempt "oppressively converts a single continuing offense into a series of individual ones." *In re Chase,* 468 F.2d 128, 135 (7th Cir. 1972). Although the court determined that the defendant's conduct was not a continuous offense, its concern with the transparent proliferation of contempts" is of significance to the case at bar.

Petitioner is confronted with a dilemma identical to that criticized in the above-mentioned cases. His conduct having been fragmented into four segments, petitioner's potential imprisonment for a single course of conduct has escalated into a total of twenty-four months. It would appear that petitioner's conduct can be manipulated in such a manner as to artificially expand the number of contempt counts and thereby avoid the necessity of a jury trial. It is such manipulative potentialities that were specifically condemned by *Bloom, Baker, Seale,* and *Chase.*

It should be noted that, in the case at bar, petitioner was actually sentenced to only six months imprisonment on one count, two months imprisonment on the other three counts to run concurrently with the six month sentence, and four months of the six month sentence were suspended. Petitioner thus, as a practical matter, is confronted by only two months actual jail time. However, as noted above, *Frank v. United States, supra* makes clear that the maximum *authorized* penalty is the determining factor. Petitioner faced a maximum sentence of twenty-four months when his contempt trial commenced. It was at that time his right to a jury trial coalesced—not when sentence was actually imposed.

The Court wishes to stress that there exists no evidence that the state court or any of the agencies involved acted in an arbitrary manner or manipulated the charges solely to deprive petitioner of his jury trial. However, petitioner's right to a trial by jury cannot be gainsaid. The potential for abuse and

manipulation exists; petitioner's constitutional right cannot be predicated upon his ability to demonstrate bad faith on the part of the court.

Since petitioner's right to a jury trial existed at the time the contempt trial began, the Court believes that petitioner should be provided every opportunity to exercise that right. Accordingly, the entire sentence of the state court should be vacated and petitioner allowed a new trial before a jury. That trial, however, shall be limited solely to the issue of whether petitioner was in violation of the temporary injunction; petitioner will not be allowed another opportunity to test the validity of said injunction.

Petitioner also alleges that he was entitled to a jury trial because the fines ($1,000 on one count and $500 on the remaining three counts for a total of $2,500), when aggregated, amount to such a sum that the offense could not be deemed petty. This issue, however, was not argued before any state court and thus could not be considered by a federal court due to petitioner's failure to exhaust state remedies. 28 U.S.C. § 2254(b).

Appendix C

In the Superior Court of the State of California
in and for the County of San Mateo

No. 149826

The People of the State of California,
Plaintiff,

vs.

Philip Joseph Maita, August Vennemeyer,
Defendants.

[March 16, 1972]

JUDGMENT OF CONTEMPT AND ORDER OF COMMITMENT

The People of the State of California to the Sheriff of the County of San Mateo, State of California, Greeting:

Whereas on January 27, 1970, a Temporary Injunction was duly and regularly granted and issued by the Honorable James T. O'Keefe, Judge of the above entitled Court, enjoining and restraining Philip Joseph Maita and August Vennemeyer, their agents and assignees, and each of them, from conducting, maintaining, using, occupying, permitting, causing or exhibiting acts of lewdness constituting a nuisance upon the premises of Easy Street, 2322 South El Camino Real, San Mateo, California, as more particularly described therein; and

Whereas, the said Temporary Injunction was, upon defendant of the parties as more particularly set forth in the Order Modifying Preliminary Injunction made and filed in the above action on September 14, 1971; and

Whereas, a true and correct copy of the Temporary Injunction was personally served upon Philip Joseph Maita by M. L. Greenfield, Inspector in the Office of the District Attorney, County of San Mateo, State of California, on January 29, 1970 and a true and correct copy of the Temporary Injunction was personally served upon August Vennemeyer by Inspector M. L. Greenfield on January 27, 1970; and

Whereas, on February 2, 1972, certified copies of Order to Show Cause Re Contempt issued by this Court on February 2, 1972, and Declaration of Charles G. De Mar in Support of Order to Show Cause Re Contempt, including Exhibit "A" Thereto, dated February 2, 1972, were personally served upon Philip Joseph Maita, Easy Street, 2322 South El Camino Real, San Mateo, California and personally served upon August Vennemeyer, 121 Entrada Court, San Francisco, California by Inspector M. L. Greenfield, commanding the said Philip Joseph Maita and August Vennemeyer, and each of them, to appear before the above entitled Court in Department 9 thereof on February 17, 1972, at the hour of 2 o'clock p.m. and then and there to show cause, if any they may have, why they and each of them should not be adjudged guilty of contempt of court and punished accordingly for wilfully disobeying and vio-

lating the Temporary Injunction heretofore duly granted and issued on January 27, 1970, as modified by stipulated Order Modifying Preliminary Injunction, made and filed September 14, 1971, which Injunction and the violations thereof by said defendants, and each of them, are more particularly described in the Declaration of Charles G. De Mar in Support of Order to Show Cause Re Contempt filed herein; and

Whereas, at the time and place named in the said Order to Show Cause Re Contempt namely on February 17, 1972, and thereafter on February 18, 1972 and March 2, 1972 and March 3, 1972, in and before Department 9 and Department 1 of the Superior Court of the State of California, in and for the County of San Mateo, Plaintiff The People of the State of California and its counsel H. Kelly Ogle, Deputy District Attorney, San Mateo County, and defendant Philip Joseph Maita and his counsel Donald A. Tenenbaum, Esq., and defendant August Vennemeyer and his counsel James T. Davis, Esq., and each of them, did appear and proceedings were had on the disobedience and violations of said Injunction by defendants, and each of them, as alleged; and

Whereas, oral and documentary evidence having been introduced, all parties having rested and the matter submitted to the Court for decision, *The Court Finds:*

1) The Temporary Injunction dated January 27, 1970, as thereafter modified pursuant to stipulation of the parties set forth in the Order Modifying Pre-

liminary Injunction dated September 14, 1971, was duly and regularly granted and made.

2) Defendant August Vennemeyer is one of the owners of the real property premises known as Easy Street, 2322 El Camino Real, San Mateo, California; is a proper party to these proceedings by reason of that fact, but has not knowingly or wilfully acted in disobedience or violation of said Injunction and is not in contempt thereof and as to defendant August Vennemeyer only the Order to Show Cause re Contempt is discharged.

3) Defendant Philip Joseph Maita has at all times since the granting of the Injunction, and the stipulated modification thereof, had and now has personal notice and actual knowledge of each, every and all of the terms thereof.

4) Defendant Philip Joseph Maita has at all times since the granting of the Injunction, and the stipulated modification thereof, had and now has the ability to comply therewith and confinement in the County Jail will in no way interfere with his ability to comply with the Injunction as modified.

5) On January 21, 1972, January 22, 1972, January 23, 1972 and January 24, 1972, and each of said dates, defendant Philip Joseph Maita at, in and about his place of business called Easy Street, 2322 South El Camino Real, City of San Mateo, County of San Mateo, State of California, deliberately, wilfully and contemptuously disobeyed, violated and failed to comply with the Injunction and the stipulated modification thereof in the following particulars:

(a) *January 21, 1972:* Violated Paragraph 1 of the original Temporary Injunction by permitting, *causing and exhibiting cocktail waitresses, the genitalia* and anuses and pubic hair areas of which were not covered completely by material which could not be seen through by the nearest spectator. Violated subparagraph 2 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures simulating the exhibition of acts of sexual intercourse by, with and between human beings. Violated subparagraph 5 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating the exhibition of acts of rectal foreplay, kissing, touching, caressing, fondling or manipulation of male or female genitalia. Violated subparagraph 8 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating sexual activity where the genitals of the performers can then be seen. Violated subparagraph 9 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating the exhibition of male and female humans engaging in activities prohibited by subparagraphs 2, 4, 5, 6 and 8 of paragraph 2 of the modified Injunction by the use of drawings or inanimate objects, referring specifically to the motion picture entitled "Snow White and the Seven Dwarfs."

(b) *January 22, 1972:* Violated Paragraph 1 of the original Temporary Injunction by permitting, causing and exhibiting cocktail waitresses, the geni-

talia and anuses and pubic hair areas of which were not covered completely by material which could not be seen through by the nearest spectator. Violated subparagraph 2 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures simulating the exhibition of acts of sexual intercourse by, with and between human beings. Violated subparagraph 4 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures simulating the exhibition of acts of oral-genital copulation. Violated subparagraph 8 of Paragraph 2 of the modified Injunction by permitting, causing, and exhibiting motion pictures exhibiting or simulating sexual activity where the genitals of the performers can then be seen.

(c) *January 23, 1972:* Violated Paragraph 1 of the original Temporary Injunction by permitting, causing and exhibiting cocktail waitresses the genitalia and anuses and pubic hair areas of which were not covered completely by material which could not be seen through by the nearest spectator. Violated subparagraph 2 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures simulating the exhibition of acts of sexual intercourse by, with and between human beings. Violated subparagraph 4 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures simulating the exhibition of acts of oral-genital copulation. Violated subparagraph 8 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures ex-

hibiting or simulating sexual activity where the genitals of the performers can then be seen.

(d) *January 24, 1972:* Violated Paragraph 1 of the original Temporary Injunction by permitting, causing and exhibiting cocktail waitresses, the genitalia and anuses and pubic hair areas of which were not covered completely by material which could not be seen through by the nearest spectator. Violated subparagraph 4 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures simulating the exhibition of acts of oral-genital copulation. Violated subparagraph 5 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating the exhibition of acts of rectal foreplay, kissing, touching, caressing, fondling or manipulation of male or female genitals. Violated subparagraph 6 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating the exhibition of female masturbation. Violated subparagraph 8 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating sexual activity where the genitals of the performers can then be seen. Violated subparagraph 9 of Paragraph 2 of the modified Injunction by permitting, causing and exhibiting motion pictures exhibiting or simulating the exhibition of male and female humans engaging in activities prohibited by subparagraphs 2, 4, 5, 6, and 8 of Paragraph 2 of the modified Injunction by the use of drawings or inanimate objects,

referring specifically to the motion picture entitled "Snow White and the Seven Dwarfs."

6) In failing to comply with the Injunction and the stipulated modification thereof as aforesaid, defendant Philip Joseph Maita acted deliberately, wilfully and contemptuously and for the purpose of increasing revenue at, in and about his place of business called Easy Street.

It Is Therefore Ordered And Adjudged that defendant Philip Joseph Maita is in contempt of court as aforesaid and that he be punished therefor by fine and imprisonment as follows:

(a) *January 21 1972:* For deliberate, wilful and contemptuous disobedience, violations and failure to comply with the Injunction and stipulated modification thereof hereinbefore found to have occurred on January 21, 1972, defendant Philip Joseph Maita is sentenced to pay a fine in the sum of One Thousand Dollars ($1,000.00) without penalty assessment within ten (10) days, viz., no later than 5 o'clock p.m., March 13, 1972, and if the fine is not paid in full within that time defendant be incarcerated in the County Jail for One (1) Day for each Ten Dollars ($10.00) of the fine not paid and, further, that defendant Philip Joseph Maita be confined in the County Jail for the period of Six (6) Months except, however, four (4) months of that time or one hundred twenty (120) days is suspended upon condition that there be no further violations by defendant Philip Joseph Maita of the Injunction herein.

(b) *January 22, 1972:* For deliberate, wilful and contemptuous disobedience, violations and failure to comply with the Injunction and stipulated modification thereof hereinbefore found to have occurred on January 22, 1972, defendant Philip Joseph Maita is sentenced to pay a fine in the sum of Five Hundred Dollars ($500.00) without penalty assessment within Ten (10) Days, viz., no later than 5 o'clock p.m., Monday, March 13, 1972, and if the fine is not paid in full within that time, defendant be incarcerated in the County Jail for One (1) Day for each Ten Dollars ($10.00) of the fine not paid and, further, that defendant Philip Joseph Maita be confined in the County Jail for the period of Sixty (60) Days, said confinement to run concurrently with the confinement imposed upon defendant for contempt occurring January 21, 1972.

(c) *January 23, 1972:* For deliberate, wilful and contemptuous disobedience, violations and failure to comply with the Injunction and stipulated modification thereof hereinbefore found to have occurred on January 23, 1972, defendant Philip Joseph Maita is sentenced to pay a fine in the sum of Five Hundred Dollars ($500.00) without penalty assessment within Ten (10) Days, viz., no later than 5 o'clock p.m. Monday, March 13, 1972, and if the fine is not paid in full within that time, defendant be incarcerated in the County Jail for One (1) Day for each Ten Dollars ($10.00) of the fine not paid and, further, that defendant Philip Joseph Maita be confined in the County Jail for the period of Sixty (60) Days, said

confinement to run concurrently with the confinement imposed upon defendant for contempts occurring January 21, 1972.

(d) *January 24, 1972:* For deliberate, wilful and contemptuous disobedience, violations and failure to comply with the Injunction and stipulated modification thereof hereinbefore found to have occurred on January 24, 1972, defendant Philip Joseph Maita is sentenced to pay a fine in the sum of Five Hundred Dollars ($500.00) without penalty assessment within Ten (10) Days, viz., no later than 5 o'clock p.m. Monday, March 13, 1972, and if the fine is not paid in full within Ten (10) Days, defendant be incarcerated in the County Jail for One (1) Day for each Ten Dollars ($10.00) of the fine not paid and, further, that defendant Philip Joseph Maita be confined in the County Jail for the period of Sixty (60) Days, said confinement to run concurrently with the confinement imposed upon defendant for contempts occurring January 21, 1972.

It Is Further Ordered that execution of the confinement imposed upon defendant Philip Joseph Maita hereinbefore provided be stayed until 5 o'clock p.m., Friday, March 10, 1972, solely to allow defendant Philip Joseph Maita time to file his proposed Petition for Writ of Certiorari before the Court of Appeal, First Appellate District, State of California. In the event defendant's Petition for Writ of Certiorari is not filed as aforesaid by that time, this stay shall terminate and defendant shall be incarcerated in the County Jail as hereinbefore provided.

In the event defendant's Petition for Writ of Certiorari is filed as aforesaid within that time, this stay shall continue so long as proceedings continue in the Court of Appeal or until further order of this Court or the Court of Appeal, whichever order shall first occur.

It Is Further Ordered that defendant be admitted to bail in the sum of Five Thousand Dollars ($5,000) cash or surety upon the express conditions of the stay of his confinement to the County Jail hereinabove provided. This Stay Order shall not apply to defendant's payment of the Two Thousand Five Hundred Dollars ($2,500.00) fine ordered herein which shall be paid, in full, on or before 5 o'clock p.m. Monday, March 13, 1972. This Stay Order shall not be construed as affecting in any way the existing Injunction and the stipulated modification thereof.

Dated: This 16th day of March, 1972

Louis B. Dematteis

Judge of The Superior Court

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
APR 10 1975

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-925

PHILIP JOSEPH MAITA,

Petitioner,

vs.

EARL WHITMORE, SHERIFF,

Respondent.

Opposition of Respondent to Petition for Writ of Certiorari

EVELLE J. YOUNGER
Attorney General of the
State of California

JACK R. WINKLER
Chief Assistant Attorney General
—Criminal Division

EDWARD P. O'BRIEN
Assistant Attorney General

GLORIA F. DEHART
Deputy Attorney General

ALVIN J. KNUDSON
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-2882

Attorneys for Respondent

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (*Maita v. Whitmore,* No. 74-1498) has not yet been published. A copy of the court's opinion is appended to the petition for a writ of certiorari (Appendix A to Petition).

The Memorandum and Order of the United States District Court for the Northern District of California is reported at 365 F.Supp. 1331 (1973). A copy of that court's opinion is also appended to the petition for a writ of certiorari (Appendix B to Petition).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United States Code, section 1257(3).

QUESTION PRESENTED

Petitioner was not entitled to trial by jury as the offense charged was a petty offense.

STATUTES INVOLVED

California Penal Code section 11225, which provides:

> "Every building or place used for the purpose of illegal gambling as defined by state law or local ordinance, lewdness, assignation, or prostitution, and every building or place in or upon which acts of illegal gambling as defined by state law or local ordinance, lewdness, assignation or prostitution, are held or occur, is a nuisance which shall be enjoined, abated and prevented, whether it is a public or private nuisance."

California Penal Code section 11226, which provides:

> "Whenever there is reason to believe that a nuisance as defined in this article is kept, maintained or is in existence in any county, the district attorney, in the name of the people of the State of California, must, or any citizen of the State resident within said county, in his own name may, maintain an action in equity to abate and prevent the nuisance and to perpetually enjoin the person conducting or maintaining it, and the owner, lessee or agent of the building, or place, in or upon which the nuisance exists, from directly or indirectly maintaining or permitting it."

California Penal Code section 11227, which provides:

> "Whenever the existence of a nuisance is shown in an action brought under this article to the satisfaction of the court or judge thereof, either by verified complaint or affidavit, the court or judge shall allow a temporary writ of injunction to abate and prevent the continuance or recurrence of such nuisance."

California Penal Code section 11229, which provides:

> "Any violation or disobedience of an injunction or order expressly provided for by this article is punishable as a contempt of court by a fine of not less than two hundred dollars ($200) nor more than one thousand dollars ($1,000) by imprisonment in the county jail for not less than one nor more than six months, or by both."

California Penal Code section 669, which provides in pertinent part:

> "When any person is convicted of two or more crimes, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same judge or by different judges, the second or other subsequent judgment shall direct whether the terms of imprisonment or any of them to which he is sentenced shall run concurrently, or whether the imprisonment to which he is or has been sentenced upon the second or other subsequent conviction shall commence at the termination of the first term of imprisonment to which he has been sentenced, or at the termination of the second or subsequent term of imprisonment to which he has been sentenced, as the case may be. . . ."

STATEMENT OF THE CASE

On December 11, 1969, the District Attorney of San Mateo County filed a civil complaint in the California Superior Court in and for the County of San Mateo against petitioner and the owner of the building in which petitioner's bar business was located.[1] The complaint alleged, pursuant to the provisions of California Penal Code section 11225, that entertainment presented in petitioner's bar constituted a

1. Petitioner's bar, the "Easy Street", offered entertainment to its patrons as well as alcoholic beverages.

public nuisance, and sought injunctive relief to abate the nuisance.

On January 27, 1970, the Superior Court issued a temporary injunction by which petitioner was enjoined from presenting certain types of films and other entertainment to patrons on his premises. This injunction was issued pursuant to the provisions of California Penal Code section 11227.

On September 14, 1971, the temporary injunction was modified pursuant to stipulation between petitioner and the San Mateo County District Attorney. Even as modified, however, the injunction continued to enjoin the exhibition of certain types of films and other entertainment.

On February 2, 1972, petitioner was served with an order to show cause by which he was charged with four counts of contempt of court for violation of the preliminary injunction of January 27, 1970, as modified September 14, 1971. The order to show cause charged that on each of four dates in January, 1972, petitioner exhibited sexually explicit films and permitted nude cocktail waitresses on his premises in violation of the injunction.

On February 17, 1972, petitioner appeared in the Superior Court in response to the order to show cause. Following a denial of petitioner's request for a jury trial, a hearing was conducted during which evidence was presented by both sides.

On March 3, 1972, the Superior Court found petitioner in contempt of court on each of the four counts alleged. Petitioner was sentenced to six months in the county jail on the first count, with four of the six months suspended. He was sentenced to sixty days in the county jail on each of the other three counts, these sentences to be served concurrently with the sentence imposed on the first count.

Petitioner was also ordered to pay a fine of $1,000.00 on Count One, and $500.00 on each of Counts Two, Three and Four, for a total of $2,500.00.

Petitioner sought relief on habeas corpus and certiorari from the California Court of Appeal, First Appellate District. His petitions were denied on May 19, 1972. The California Supreme Court denied a hearing on June 15, 1972.

On June 6, 1972, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California. At substantially the same time, the Honorable William O. Douglas, Associate Justice of the United States Supreme Court, issued an order staying the judgment of the California Superior Court pending the filing and adjudication of a petition for writ of certiorari in the United States Supreme Court. Petitioner filed a petition for writ of certiorari to the United States Supreme Court on September 1, 1972. The petition was denied on February 20, 1973 (Mr. Justice Douglas would have granted certiorari) (No. 72-407).

The habeas corpus petition was then resubmitted to the District Court. On November 12, 1973, following a hearing, the District Court issued a memorandum and order by which it concluded, *inter alia,* that petitioner had been deprived of his Sixth Amendment right to trial by jury in the state court. The District Court therefore vacated the judgment and sentence of the California Superior Court. Notice of appeal from this order was filed in timely fashion, and the District Court stayed imposition of its order pending determination of the appeal.

On December 9, 1974, the Court of Appeals for the Ninth Circuit reversed the order of the District Court, holding that petitioner's right to a jury trial had not been abridged. The Court of Appeals stayed the issuance of its mandate

pending the filing of a petition for writ of certiorari in the United States Supreme Court.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

The offense with which petitioner was charged herein was a petty offense not requiring trial by jury, as the California Legislature has determined by virtue of California Penal Code section 11229 that such violations are punishable by no more than six months imprisonment. Moreover, while petitioner was charged with four separate violations of that statute, the total sentence imposed for all of the violations was less than six months, and, therefore, this case is squarely governed by the holding of this Court in *Taylor v. Hayes,* 418 U.S. 488 (1974).

ARGUMENT

I. Petitioner Was Not Entitled to Trial by Jury, as the Offense Charged Was a Petty Offense.

Petitioner contends that the decision of the Court of Appeals conflicts with the decisions of this Court, and that denial of jury trial constituted a violation of rights guaranteed him by the Sixth Amendment to the United States Constitution. In support of this contention, petitioner urges that, as he was charged with four counts of contempt, he faced a total possible sentence of two years in jail. Accordingly, placing principal reliance on the holding of this Court in *Baldwin v. New York,* 399 U.S. 66, 69 (1970), petitioner urges that it should be the maximum sentence *possible* under all counts combined which dictates whether jury trial is available, rather than the sentence actually imposed.

At the outset, we submit that petitioner's argument was specifically rejected by this Court in *Taylor v. Hayes,* 418 U.S. 488 (1974). In that case this Court stated:

> "Petitioner contends that any charge of contempt of court, without exception, must be tried to a jury. Quite to the contrary, however, our cases hold that petty contempt like other petty criminal offenses may be tried without a jury and that contempt of court is a petty offense when the penalty actually imposed does not exceed six months or a longer penalty has not been expressly authorized by statute. *Cheff v. Schnackenberg,* 384 U.S. 373 (1966); *Bloom v. Illinois,* 391 U.S. 194 (1968); *Dyke v. Taylor Implement Mfg. Co., Inc.,* 391 U.S. 216 (1968); *Frank v. United States,* 395 U.S. 147 (1969); *Baldwin v. New York,* 399 U.S. 66 (1970). Hence, although petitioner was ultimately found guilty and sentenced separately on eight counts of contempt, the sentences were to run concurrently and were, as the Kentucky Court of Appeals held, equivalent to a single sentence of six months. Cf. *Codispoti v. Pennsylvania, post,* p. 506. The original sentences imposed on the separate counts were to run consecutively and totaled almost four and one-half years, with two individual counts each carrying a year's sentence. But the trial court itself entered an amended judgment which was understood by the Kentucky Court of Appeals to impose no more than a six-month sentence. The eight contempts, whether considered singly or collectively, thus constituted petty offenses, and trial by jury was not required." *Id.* at pp. 495-496.

In the case at bar petitioner was cited for four independent counts of contempt, each pursuant to the provisions of California Penal Code section 11229. By the terms of that statute, violation of the injunction herein was punishable "by imprisonment in the county jail for not less than one nor more than six months . . ." Thus, petitioner's reliance on *Baldwin v. New York, supra,* is misplaced, as that case is readily distinguishable. The New York statute under

which the defendant was tried in that case provided for a possible one-year sentence for each violation. 399 U.S., at pp. 69-70. This Court held that jury trial was required due to the *possibility* of a one-year sentence, adhering to the rule of *Duncan v. Louisiana,* 391 U.S. 145 (1968), that the Sixth Amendment requires that defendants be afforded the right to trial by jury when they stand accused of *serious* crimes. This Court has consistently held, however, that a "petty" offense for which jury trial is not required is one in which no more than six months imprisonment is authorized. *Codispoti v. Pennsylvania,* 418 U.S. 506, 512 (1974). Significantly, petitioner could not have been punished by imprisonment for more than six months for each violation of California Penal Code section 11229. Thus, the California Legislature has not determined that such violations constitute serious crimes for which jury trial is required.

Further, as in *Taylor v. Hayes, supra,* the terms of imprisonment to which petitioner was actually sentenced for *all* of the violations did not constitute a period of more than six months. Indeed, petitioner herein was sentenced to six months imprisonment on the first violation, *four months of which was suspended.* On each of the other three violations he was sentenced to a term of sixty days imprisonment, but those terms were ordered to run *concurrently* with the terms of imprisonment imposed for the first violation. Thus, petitioner was actually sentenced to a period of sixty days imprisonment for all of the violations. Respondent therefore submits that this case is squarely governed by *Taylor v. Hayes, supra,* and that accordingly, petitioner's argument must be rejected.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated: April 4, 1975

EVELLE J. YOUNGER
Attorney General of the
State of California

JACK R. WINKLER
Chief Assistant Attorney General
—Criminal Division

EDWARD P. O'BRIEN
Assistant Attorney General

GLORIA F. DEHART
Deputy Attorney General

ALVIN J. KNUDSON
Deputy Attorney General
Attorneys for Respondent